IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DR. NANCY SEBRING, **PLAINTIFF,** **VS** **THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT,** **DEFENDANT.** **DES MOINES REGISTER AND TRIBUNE COMPANY,** **INTERVENOR,** **AND** **INTERESTED PARTY,** **INTERVENOR.**	**CASE NO. CE71688** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING**

This matter came before the court on June 14, 2012, for hearing on plaintiff's "Petition for Declaratory and Injunctive Relief Pursuant to Iowa Code Section 22.8." Appearing for plaintiff Dr. Nancy Sebring (hereinafter "Dr. Sebring") were her attorneys, Matthew Brick and Douglas Fulton. Dr.Sebring was not present. Appearing for defendant the Des Moines Independent Community School District (hereinafter "the School District") was its attorney, Patrick Smith.

The court addressed certain preliminary matters before addressing the merits of Sebring's petition. Before the court were 1) a request for expanded media coverage and 2) two petitions for intervention – one by the Des Moines Register (hereinafter "the Register") which was represented by its editor, Rick Green, and its attorney, Michael Giudicessi, and another by an individual who had also filed an "Application to Proceed Pseudonymously," and was

represented by attorney Machelle Krumm. This individual was not present, either. Though the request for expanded media coverage was initially resisted by Dr. Sebring (which resistance was joined by the individual seeking to intervene), that resistance was withdrawn and said request was granted. Likewise, the two petitions for intervention were not resisted and thus were granted. As to the individual intervenor's request to proceed pseudonymously which was resisted by the Register, same was taken under advisement and will be addressed herein along with the court's ruling on the merits of Dr. Sebring's and the individual intervenor's requests for injunctive relief.

The court, having received the evidence, including the School District's Exhibit A and the Register's Exhibits 1 and 2 which were submitted for the court's *in camera* review, having reviewed same including conducting the aforementioned *in camera* review, and having entertained the arguments of counsel, now rules on the requests by Dr. Sebring and the individual intervenor for injunctive relief as well as the individual intervenor's request to proceed pseudonymously. For the reasons stated herein, Dr. Sebring's and the individual intervenor's requests for injunctive relief are **DENIED** and Dr. Sebring's petition for injunctive relief is **DISMISSED** with court costs taxed against Dr. Sebring. The individual intervenor's request to proceed pseudonymously is **DENIED** because it is moot.

FINDINGS OF FACT

Dr. Sebring is the former superintendent of schools for the School District. She offered her resignation from that position on May 9, 2012, and the School District's board accepted her resignation on May 10, 2012. Prior to Dr. Sebring's resignation, certain members of the media including the Register made requests of the School District pursuant to Iowa Code Chapter 22 for copies of certain e-mail communications to which Dr. Sebring had been a party and which

were made by Dr. Sebring on the School District's e-mail system with the use of a computer owned by the School District. Many of these communications were also conducted by Dr. Sebring while on the job. Many of these e-mail communications were between Dr. Sebring and the individual intervenor. Many of these e-mail communications between Dr. Sebring and the individual intervenor concerned a romantic sexual relationship the two had struck up with one another. Many of these e-mails contain explicit and graphic references to the sexual activity in which the two individuals had engaged. The School District produced the requested e-mail communications. At least two of these e-mails identify the individual intervenor by name. Some of these e-mails have been published by the Register.

The Register has now made additional open records requests of the School District for Dr. Sebring's e-mail communications. The e-mails which the School District proposes to produce in response to these requests also contain numerous references to the romantic sexual relationship between Dr. Sebring and the individual intervenor, numerous explicit and graphic references to their sexual activity, and, last but by no means least, numerous references to the individual intervenor by name, occupation, and employer. The individual intervenor states (by means of his/her affidavit) that, if these additional e-mail communications are produced by the School District and if his/her identity is made public, he/she "…will be absolutely personally and professionally destroyed." He/she further states that his/her family will be damaged beyond repair, that he/she will lose his/her career as a result, and that his/her reputation in the community will be damaged beyond repair.

CONCLUSIONS OF LAW

This case involves Chapter 22 of the Iowa Code regarding "Examination of Public Records (Open Records)." It is the stated policy of Chapter 22 "…that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code Section 22.8 (3). Chapter 22 "is designed 'to open the doors of government to public scrutiny'" and "to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." Gannon v. Bd. of Regents, 692 N.W.2d 31, 38 (Iowa 2005); Northeast Council on Substance Abuse, Inc. v. Iowa Dept. of Pub. Health, 513 N.W.2d 757, 759 (Iowa 1993). It "invites public scrutiny of the government's work, recognizing that its activities should be open to the public on whose behalf it acts." Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999). It "…establish[es] a liberal policy of access from which departures are to be made only under discrete circumstances." Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299 (Iowa 1979). The "…legislature intended for the disclosure requirement to be interpreted broadly and for the… exceptions to be interpreted narrowly." De La Mater v. Marion Civil Service Commission, 554 N.W.2d 875, 878 (Iowa 1996).

Both Dr. Sebring and the individual intervenor ask this court to enjoin the school district from producing these additional e-mails pursuant to Iowa Code Section 22.8. They base their request on three arguments. First, they claim that the subject e-mails are not "public records" subject to examination, copying, and dissemination, by publication or otherwise, by any person pursuant to Iowa Code Sections 22.1 (3) (a) and 22.2 (1). Second, they claim that, even if said e-mails are public records, they must be kept confidential pursuant to Iowa Code Section 22.7 (18). Third, they claim that production of the e-mails must be enjoined because they are clearly not in

the public interest and their disclosure would substantially and irreparably harm them and/or others. The court will address these arguments in that order.

1. Are the subject e-mails "public records"?

The term "public records", as used in Chapter 22, "… includes all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to… any… school corporation." Iowa Code Section 22.1 (3) (a). "A document of the government is a document that was produced by or originated from the government. Documents belonging to the government would include those documents that originate from other sources but are held by public officers in their official capacity." City of Dubuque v. Dubuque Racing Ass'n, Inc., 420 N.W.2d 450, 452 (Iowa 1988) (Emphasis supplied). The individual intervenor suggests that personal e-mails generated by Dr. Sebring and him/her can't be public records because they weren't generated by a public servant acting in his/her official capacity. However, the clear language of the statute is not so limited and for good reason.

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully, and competently performing their function as public servants.

MacEwan v. Holm, 226 Ore. 27, 38, 359 P.2d 413, 418 (1961) (Cited with approval in City of Dubuque v. Dubuque Racing Ass'n, Inc., supra). Dr. Sebring's e-mails to the individual intervenor are clearly documents of the government. The individual intervenor's e-mails to Dr. Sebring are documents belonging to the government. As such they are all public records as that term is defined in Chapter 22. As such they may be examined and copied and the information

contained in them may be disseminated, by publication or otherwise. Iowa Code Section 22.2 (1).

2. Are the subject e-mails "confidential records"?

Certain categories of public records must be kept confidential pursuant to Iowa Code Section 22.7. According to Section 22.7 (18), the term "confidential records" includes the following:

> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination….

Bearing in mind that exceptions to disclosure under Chapter 22 are to be narrowly construed, the court concludes that Section 22.7 (18) is not applicable to the subject e-mails. First, common sense dictates that communications that should not have been occurring in the first place – personal communications using the School District's computer equipment and e-mail system, in violation of written school district policy – would not be protected from disclosure. The court agrees with the Register that Section 22.7 (18) protects whistle-blowing and related communications to government bodies by persons outside of government to ensure that necessary communications serving governmental interests – investigation, enforcement of laws and regulations, etc. – are encouraged, not discouraged.

Second, by its own terms the section applies to incoming communications and not outgoing communications. Certainly, the outgoing e-mails of Dr. Sebring would not be

protected. Third, this section applies to incoming communications from persons outside of government. The individual intervenor and/or Dr. Sebring carry the burden of demonstrating that the elements of Section 22.7 (18) are present. The individual intervenor has proven, at most, that he/she is neither an employee of the School District nor a consultant of or a contractor for the School District nor is he/she compensated by the School District. However, except for the foregoing, it has not been proven that the individual intervenor is a person outside of the rest of government. For all the foregoing reasons, the subject e-mails do not qualify for protection as confidential records under Iowa Code Section 22.7 (18).

3. Are Dr. Sebring and/or the individual intervenor entitled to injunctive relief under Iowa code section 22.8?

Anyone who would be aggrieved or adversely affected by disclosure of public records may bring an action to enjoin such disclosure. Iowa Code Section 22.8 (4) (e). The court may grant an injunction restraining examination of a specific public record or a narrowly drawn class of public records if, but only if, the requesting party's petition, supported by affidavit, shows and if the court finds both a) that examination would clearly not be in the public interest and b) that examination would substantially and irreparably injure any person or persons. Iowa Code Sections 22.8 (1) (a) and ((b). Such an injunction may be issued only if the person seeking it demonstrates that its issuance is authorized by clear and convincing evidence. Iowa Code Section 22.8 (3). In determining whether an injunction should issue, the court "…shall take into account the policy of [Chapter 22] that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Id. Finally, an injunction may be issued only if it would be justified

under this section for every member within the class of records involved if each of those members were considered separately. Id.

a. The public interest.

Dr. Sebring and the individual intervenor both argue that their purely personal communications are not matters of public interest. The court concludes that this is indicates a fundamental misunderstanding of what the public interest is. The public is justifiably interested in the operations of the School District, the interplay between the school board members and the superintendent, the specific decisions and actions taken by the school district in connection with various matters, and the reasons for same. The subject communications could be informative as to the conduct and views of Dr. Sebring. They may reveal the nature and extent of her use of School District computers and e-mail system and thereby illustrate her regard—or disregard-- for School District policies concerning computer use and communications. In the event that they show Dr. Sebring's disregard for such policies, they could supply the reasons why Dr. Sebring submitted her resignation and why the School District accepted same, arranged for her early departure, and proceeded with the appointment of an interim superintendent to take her place. Likewise, to the extent that the e-mails might reveal how the individual intervenor interacted with not only Dr. Sebring but also students, teachers, other employees of the School District, or elected officials, they would also be of interest to the public. For these reasons the court concludes that neither Dr. Sebring nor the individual intervenor have succeeded in proving that examination of the subject e-mails would not be in the public interest and most certainly have not proven same by clear and convincing evidence.

b. Substantial and irreparable injury.

Similarly, neither Dr. Sebring nor the individual intervenor have supplied clear and convincing evidence that the disclosure of the e-mails would substantially and irreparably harm either of them or anyone else. Dr. Sebring has already suffered whatever harm that resulted from the initial disclosures of her e-mail communications with the individual intervenor. She has offered no proof that disclosures of additional e-mail communications would materially affect her situation. Likewise, the individual intervenor's statements in his/her affidavit supplied no evidence that his/her concerns about the effect disclosure of the subject communications might have on family, employment, or reputation are valid. Considering the frequency of marital infidelity in modern society and the inundation of modern society with matters relating to human sexuality, it would be pure speculation to estimate what harm if any he/she might suffer as a result of disclosure of the subject e-mail communications, notwithstanding their salaciousness, let alone to assume it would be substantial and irreparable. Certainly, there is not clear and convincing evidence of any substantial and irreparable injury.

In the event the court refused her request to simply enjoin the disclosure of the subject e-mail communications altogether, Dr. Sebring requested alternatively that the court require the School District to notify her of any open records requests and to permit her the opportunity to review the School District's proposed response to same before it actually makes said response. She argues that such release is required to effectuate the entirety of Iowa Code Section 22.8 and to give it the just and reasonable result and the result feasible of execution intended by its enactment. See Iowa Code Section 4.4. To do otherwise, she argues, would make the availability of injunctive relief a hollow promise.

Section 22.8 permits the lawful custodian of public records to incur a certain amount of delay in permitting the examination and copying of these records for certain specified reasons. However, no provision of Chapter 22 contemplates the sort of notification Dr. Sebring is requesting. Further, she has neglected to mention that it is to be presumed that public interest is favored over any private interest in the enactment of a statute. Iowa Code Section 4.4 (5). Because the sort of relief Dr. Sebring requests apparently is not contemplated by Iowa Code Chapter 22 and because the legislature has made it so abundantly clear that, in enacting Chapter 22, the public interest comes first, ahead of any private interest, the court concludes that the sort of relief Dr. Sebring is requesting is not available when it comes to access to public records.

For all the foregoing reasons, neither Dr. Sebring nor the individual intervenor have made the evidentiary showing necessary for the issuance of injunctive relief pursuant to Section 22.8.

4. Should the individual intervenor be allowed to proceed "pseudonymously"?

Because the court has concluded that neither Dr. Sebring nor the individual intervenor are entitled to the injunctive relief they have requested, their requests for same must be dismissed. As a result, the individual intervenor's application for permission to proceed pseudonymously is moot and may be denied for that reason. However, even if one assumed that the application was not moot, the court would deny same.

As the parties have found, there is scant legal authority in Iowa concerning this topic. What little there is suggests that a) the matter should be left to the court's discretion, b) the decision should involve a balancing of the relative interests of the parties and the public, and c) that ultimately the court must determine whether the party making the request has a substantial

privacy right that outweighs the customary and constitutionally embedded presumption of openness in judicial proceedings. See Riniker v. Wilson, 623 N.W.2d 220, 226-27 (Ia.Ct. App. 2000); Doe v. Hartz, 52 F.Supp.2d 1027, 1046-47 (N.D. Iowa 1999). In addition, the fact that the requesting party may suffer personal embarrassment, standing alone, does not require the granting of the party's request to proceed under a pseudonym. Doe, supra at 1046.

So far as the court can tell, in this case it would be impossible to determine the consequences of requiring the individual intervenor to proceed under his/her own name . The court does not dispute that he/she will suffer personal embarrassment. However, any attempt to more precisely predict the consequences would be pure speculation. For this reason, the court concludes that the public's interest in the openness of judicial proceedings outweighs any privacy right of the individual intervenor.

RULING

IT IS THEREFORE ORDERED that the requests of plaintiff and the individual intervenor for injunctive relief are **DISMISSED** and defendant the Des Moines Independent Community School District, as the legal custodian of the requested public records, shall produce same to the requesting parties, including intervenor the Des Moines Register, pursuant to the provisions of Iowa Code Chapter 22.

IT IS FURTHER ORDERED that the individual intervenor's request to proceed pseudonymously is hereby **DENIED** as moot.

IT IS FURTHER ORDERED that court costs be taxed to plaintiff.

Dated this ____ day of _____, _____.

Robert B. Hanson
District Judge

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